In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-221

SIERRA TERRENO, a Limited Partnership,
CAL-PACIFIC RESOURCES, INC.,
WALTER E. BLOOM, et al.,
PETITIONERS,

VS.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the State of California
Third Appellate District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES CITED

CASES

Constitution

Statute

Ordinance

Miscellaneous

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OPINION BELOW

The state court opinion is adequately referenced in the Petition.

JURISDICTION

The jurisdictional statement in the Petition is accurate.

QUESTION PRESENTED

Does the Fifth Amendment of the United States Constitution require that TRPA pay damages for the deprecia-

tion in value suffered on Petitioners' 454 unimproved lots, which damages allegedly were caused by TRPA's zoning the lots Low Density Residential and General Forest, permitting four dwelling units per acre and one dwelling unit per lot, respectively, and which uses are less intense than those permitted under prior El Dorado County zoning?

STATUTES INVOLVED

The Petition adequately references the pertinent constitutional provisions, with the exception of the Compact clause (Article I, § 10, Cl. 3 of the Constitution of the United States). Further, the Petition omits reference to the Tahoe Regional Planning Compact (Public Law No. 91-148, 83 Stat. 360).

STATEMENT OF THE CASE

Petitioners own 454 unimproved lots within the Lake Tahoe Region. Such lots were zoned by El Dorado County for residential, multi-family residential, industrial and commercial uses.

TRPA was created by Congressional ratification of a proposed compact between the States of California and Nevada [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]. The Compact invests TRPA with jurisdiction over the watershed area of the Lake Tahoe Basin, the area in which petitioners' lots are situate [Article II(a) Compact]. TRPA has no authority to own or condemn property, has never owned any property, and has never sought to acquire any property.

Pursuant to Compact requirements, TRPA adopted a *Land Use Ordinance* zoning all property within the Region,

including petitioners' [Article VI Compact]. That ordinance classifies petitioners' lots for uses less intensive than those allowed by El Dorado County's prior zoning.

Some of petitioners' lots are designated Low Density Residential by TRPA. TRPA's Low Density Residential classification permits single family dwelling units up to four (4) dwelling units per acre and numerous non-residential uses.

Some of petitioners' lots are designated General Forest by TRPA. TRPA's General Forest classification permits a single-family residence on each lot, resource extraction, skiing facilities, privately owned campgrounds and other uses.

At the time of El Dorado County zoning of petitioners' lots, a freeway had been planned by the State of California in close proximity to the lots. Such freeway proposal has since been abandoned by the State of California.

Contending that the abandonment of the proposed freeway and TRPA's zoning of their lots for less intense uses had depreciated the value of their land, petitioners filed three separate actions in the Superior Court of the State of California in and for the County of El Dorado. Defendants were TRPA, El Dorado County and the State of California.

The complaints sought to recoup the difference in value between El Dorado County's land use classifications with a freeway in close proximity and the lesser value under TRPA's classifications with no freeway. The alleged difference in value is 75%. Petitioners contend that only 25% remains of the value their lots enjoyed under the prior

zoning of El Dorado County. Petitioners expressly disclaimed declaratory, injunctive or other relief in the nature of mandamus; petitioners limited themselves to damages.

After numerous complaint amendments, demurrers on behalf of all defendants were sustained by the trial court in all three cases without leave to amend. During the pendency of petitioners' state court appeal, the state and county were voluntarily dismissed. Subsequent to affirmance of the trial court judgment and denial of hearing by the California Supreme Court, this petition was filed.

REASONS FOR DENIAL OF THE WRIT

1. The Question Framed by the Petition Is Not Presented on this Record. A Single-Family Residence on Each of Petitioners' 454 Lots Is Not "No Use".

The petition frames the intellectually fascinating question of whether the Fifth Amendment constitutionally requires just compensation for a governmental act depriving a party of all feasible use of his property. Compelling public interests have been held to justify even such restrictive regulations. *Miller v. Schoene,* 276 U.S. 272 (1928), upheld the uncompensated destruction of cedar trees by governmental order when such "ornamental" trees posed a threat of infestation to nearby agricultural crops; *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), upheld a prohibition on a brickyard business as incompatible with nearby uses despite nearly a 90% depreciation in property value; and *Goldblatt v. City of Hempstead,* 369 U.S. 590 (1962), upheld a governmental prohibition on excavations below water table which effectively eliminated the only economically feasible use of property.

Relying on the foregoing authority, TRPA could cogently urge that the Compact's legislative history and findings, articulating the need for more stringent land use and environmental controls,[1] afford the compelling governmental interest for such "no use" regulations. Indeed, the governmental interests articulated by the Compact and its legislative history appear more compelling than those recognized in the foregoing authority.

There is, however, no need to reach the intellectually interesting, but, for purposes of this case, academic, question of whether monetary relief would be appropriate under the Fifth Amendment against TRPA if it should adopt regulations denying substantially all use of property. Petitioners' own complaints herein admit that even on the most restrictively zoned lots a single-family residence is permitted. A single-family residence on each of 454 subdivided lots is hardly no use.

2. The Record Herein Presents no More Than an Attempt to Recover the Difference in Value Between Use Classifications. This Case Involves Neither the Direct Frustration of Distinct Investment-Backed Expectations Nor Governmental Proprietary Functions "Interfering" with the Use of Petitioner's Property.

Petitioners seek relief squarely barred by a long line of decisions of this court culminating in *Penn Central Transportation Co. v. New York City,* ..... U.S. ....., 46 Law Week 4952, Opinion No. 77-444 (June, 1978).

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[1]See Compact, Article I. The legislative history in question is contained at 115 Cong. Rec. 33068-33069 and is quoted at length in footnotes 1, 2, 3 and 16 of *Younger v. County of El Dorado,* 5 Cal. 3d 480, 487 P. 2nd 1193 (1971).

Petitioners essentially seek as Fifth Amendment "damages" the difference in value between two land use classifications. As in *Penn Central,* petitioners do not dispute the governmental goals underlying TRPA's zoning nor do they dispute that the zoning so imposed is an appropriate means of securing those goals.[2] Instead, petitioners seek the value they believe they would have realized had they exploited their lots in a manner that they once perceived as being possible.

This court has frequently rejected such claims.

> "By its nature, zoning 'interferes significantly with owners' uses of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance . . .'."
>
> *Eastlake v. Forest City Enterprises,* 426 U.S. 668, 674 n. 8 (1976).

> ". . . (T)he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."
>
> *Penn Central Transportation Co. v. New York City, supra,* Slip Opinion at page 24.

[2]Petitioner's do, indeed, seek to parse the motivations of TRPA in adopting its comprehensive *Land Use Ordinance.* Such hypothesizing, aside from being belied by the specific provisions of the Compact, (i.e., the absence of condemnation authority), is not even a proper subject of judicial inquiry. *United States v. O'Brien,* 391 U.S. 367, 383-386 (1968) and *Arizona v. California,* 283 U.S. 423, 455 (1931).

Diminution in value as a result of governmental regulation, such as the 75% diminution urged by petitioners, simply is not an *ipse dixit* test of "taking".

> "(T)he decisions sustaining other land use regulations, which, like the New York law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a taking, see *Euclid v. Ambler Realty Co., supra* (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian, supra* (87½% diminution in value). . . ."
>
> *Penn Central Transportation Co. v. New York City, supra,* Slip Opinion at page 25.

The circumstances which have been judicially recognized as justifying compensation pursuant to the Fifth Amendment have been aptly characterized as the undue direct frustration of investment-backed expectations or governmental proprietary activities which distinctly affect recognized real property interests. *Id.* Slip Opinion, pages 18-19. Neither exists herein.

Petitioners' expectations that their properties would appreciate in value by favorable zoning are hardly the contractually reserved rights to mine coal recognized in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922). Unless the Fifth Amendment constitutionally requires compensation *whenever* zoning is imposed or changed, petitioners' expectations are precisely the same as those found not entitled to Fifth Amendment compensation in *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Penn Central Transportation Co. v. New York City, supra.*

Nor have petitioners suffered direct interference by a uniquely governmental function. Neither a proprietary governmental invasion of petitioners' lots, e.g., *Causby v. United States,* 328 U.S. 256 (1946), nor the physical damage caused by governmental police functions is alleged to exist herein. See, e.g., *YMCA v. United States,* 395 U.S. 85 (1969).[3]

Nor do petitioners offer any other considerations which would remove this case from the familiar principle that comprehensive land use measures will not be proscribed on Fifth Amendment grounds merely because they economically burden some properties more than others. The very authority relied upon in the petition states the apposite rule:

> "[The Fifth Amendment] does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision."
>
> *United States v. Willow River Power Company,* 324 U.S. 499, 502 (1945).

[3]The petition urges that petitioners' 454 lots have been "devoted" to a "public use" of open-space, perhaps suggesting that petitioners complain of a governmental proprietary action. Such characterizations should not mislead. Petitioners ability to develop a dwelling unit per lot on their General Forest lands and four dwelling units per acre on their Low Density Residential lands remains. To be sure, since such zoning is less intense than formerly permitted by El Dorado County, the portion of the lots not occupied by the dwelling unit can be characterized as "devoted to open space" to the degree that such area would have been occupied by the industrial structures contemplated by petitioners. Such area "devoted to open space" is, however, no different than the: (i) "open areas" to be left unbuilt upheld in *Gorieb v. Fox* 274 U.S. 603 (1927); (ii) "open area" proscribed by the height limit sustained in *Welch v. Swasey,* 214 U.S. 91 (1909); or (iii) "open area" above Penn Central Station sustained as part of New York City's Landmark Preservation law in *Penn Central, supra.* Any regulation which lessens the intensity of permitted development is subject to the characterization that the decrement in intensity is to that extent "devoted to open space". Such characterizations manifestly do not shape Fifth Amendment jurisprudence nor may a pleader so facilely raise Fifth Amendment claims.

No elements appearing excepting this case from customary principles that the Fifth Amendment does not socialize all loss resulting from uniform police power regulations, certiorari is appropriately denied.

3. No Similarity of Issues Exists Between This Case and the Case Presently Before This Court to Which TRPA Is a Party.

As is apparent from the opinion below [Appendix], the lower court relied extensively on the opinion of the California Supreme Court in *HFH, Ltd. v. Superior Court,* 15 Cal. 3d 508 (1975), *cert. den.* 425 U.S. 904. There, the California Supreme Court held inverse condemnation an inappropriate remedy for the downzoning of property from commercial to very low density residential. The alleged devaluating effect of such zoning was in excess of 80%. The identity of such facts with those presented by the complaints herein is manifest. With such identity of fact both the District Court of Appeals and the California Supreme Court (the latter by denying hearing) appropriately found inverse condemnation does not lie herein.

Petitioners attempt to overturn the settled result of *HFH* by urging this court to grant certiorari based upon this court having recently granted certiorari in a separate case. Petitioners' miscitation of the case presently before

this court is indicative of petitioners' misconception of the issues therein before this court.

To be sure, *Lake Country Estates v. TRPA,* No. 77-1327 is presently before the court. The issues therein bear no resemblance to those proffered by this petition. The issues tendered in *Lake Country* are three: (i) the amenability of TRPA to suit in federal court in view of the Eleventh Amendment (and a related contention of waiver of such immunity); (ii) the scope of immunity of individual TRPA Governing Body members for their acts; and (iii) whether *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971), insofar as it affords a "constitutional tort" remedy, is appropriately extended to claims against Governing Body members.

Other than the fact that TRPA is a party in each case, the two cases are entirely distinct and the pendency of one case before this court does not indicate the other should be here.

CONCLUSION

". . . [M]ere diminution of market value or interference with property owners' personal plans and desires relative to its property is insufficient to invalidate a zoning ordinance . . .", *Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n. 8 (1976). It was based on this fundamental principle that the state court held for respondent below. It is based on this fundamental principle that certiorari is appropriately denied.

Dated September ....., 1978.

Respectfully submitted,

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